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**ADMITTED IN PENNSYLVANIA ONLY

December 21, 1992

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Sir or Madam:

Enclosed for filing are an original and nine copies of the Reply Comments of the City of St. Paul in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, MM Docket No. 92-258.

Sincerely,

MILLER & HOLBROOKE

By Lisa S. Gelb
Lisa S. Gelb

Enclosures
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Before the
FEDERAL COMMUNICATIONS COMMISSI
Washington, D.C. 20554

In the Matter of	
Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992	MM Docket No. 92-258
Indecent Programming and Other Types of Materials on Cable Access Channels	

REPLY COMMENTS OF THE CITY OF ST. PAUL

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December 21, 1992

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SUMMARY OF ARGUMENT

Cable operators in many communities have expressly agreed not to exercise any control over facilities provided for public, educational or governmental ("PEG") access use. In St. Paul, Minnesota, for example, the City of St. Paul ("the City") has authority to determine the rules and procedures that will govern use of all access facilities and equipment. The franchised cable operator, Continental Cablevision of St. Paul, Inc. ("Continental"), expressly agreed to this provision. In December 7, 1992 comments to the FCC, however, Continental's parent company (and other cable operators) asked the Commission to determine that such provisions, and related provisions governing indemnification of cable operators, are preempted by Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act").

Agreements regarding control over, and liability for, PEG access facilities should remain fully enforceable. Such agreements are not in any way inconsistent with, or preempted by, the Act. Section 10 of the Act permits, but does not require, cable operators to censor certain types of PEG access program material. Nothing prohibits a cable operator from entering into contracts at the local level (with cities, access centers or producers) that define how and under what circumstances this permissive right may be exercised; indeed, nothing prevents the operator from agreeing that it will not exercise any rights it may have to ban certain types of PEG programming. The Cable Act

fully supports and is consistent with such agreements. For example, it generally requires cable operators to refrain from exercising editorial control over PEG channels (47 U.S.C. § 531(e)) and specifically authorizes franchising authorities and cable operators to enter into agreements "that certain cable services shall not be provided or shall be provided subject to conditions if such cable services are obscene or are otherwise unprotected by the Constitution of the United States." 47 U.S.C. 544(d)(1).

Moreover, an operator's promise not to interfere with rules regarding PEG facilities is often made in exchange for substantial benefits. For the FCC unilaterally to modify carefully negotiated agreements and to invalidate promises made by cable operators would unfairly and unnecessarily harm franchising authorities, cable subscribers and PEG access programmers.

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In the Matter of	)	
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REPLY COMMENTS OF THE CITY OF ST. PAUL

I. INTRODUCTION

The City of St. Paul, Minnesota ("the City") issued a 15-year cable franchise to Continental Cablevision of St. Paul, Inc. ("Continental"). According to the franchise, as amended, Continental is obligated to make available for access programming purposes six video channels on its cable system in the City, for public, educational and governmental ("PEG") use.

During the course of the franchise, disputes arose between Continental and the City. The City notified Continental that it was out of compliance with the franchise and, as a result, Continental filed an application to modify the franchise. Shortly thereafter, the City issued a violations notice to Continental. One of the primary issues of dispute pertained to Continental's failure to comply with its obligations with respect to PEG access facilities. On September 15, 1992, the day after the Conference Report on the Cable Television and Consumer Protection Act of 1992 ("the Act") was issued,[1] and after more

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[1] H. Rep. 862, 102d Cong., 2d Sess. (1992)

than a year of intense negotiations, the City entered into a Settlement Agreement with Continental, whereby the City agreed to rescind its violations notice and Continental agreed to rescind its modification application. Prior to the settlement, Continental had broad obligations to support PEG access and to produce local origination programming. As part of the Settlement Agreement, Continental was relieved of all of its local origination programming production obligations, and its PEG obligations were restructured. While Continental will provide facilities and other specified support, responsibility for local programming obligations (including PEG) will be assumed by the City and/or by a non-profit entity or entities designated by the City (the "Designated Entity"), on a date agreed to by the parties.

As part of the Settlement, the parties agreed to make certain conforming changes to the provisions of the City Code that govern Continental's performance. The City Code, as amended, now provides that the Designated Entity will indemnify Continental for any acts or omissions on the part of the Designated Entity, but the indemnity provision expressly precludes claims for which Continental is immune from liability under 47 U.S.C. 558. In addition, Continental agreed that the City would have responsibility for the rules and regulations governing the use of the PEG access facilities, and equipment.

Continental's parent company has submitted comments to the Commission, requesting it to clarify that agreements by a cable

operator not to exercise control over PEG facilities are preempted by the Act.[2] Similar requests have been made by other operators. The City urges the FCC to reject the pleas made by the cable operators, because agreements governing the manner in which operators exercise control over PEG channels, such as the recent St. Paul agreement, are neither inconsistent with, nor preempted by, the Act. Moreover, public policy concerns weigh heavily in favor of a determination that such agreements regarding a cable operator's liability for, and control over, PEG access programming are not in any way affected by Section 10 of the Act.

II. THE FCC SHOULD CLARIFY THAT THE ACT DOES NOT PREEMPT ANY AGREEMENTS BETWEEN A CABLE OPERATOR AND A FRANCHISING AUTHORITY REGARDING A CABLE OPERATOR'S LIABILITY FOR, OR CONTROL OVER, PEG ACCESS PROGRAMMING AND FACILITIES

A. Nothing in the Act Prevents A Cable Operator from Agreeing to Waive Its Right to Censor Certain PEG Access Programming.

Section 10(c) of the Act requires the FCC to promulgate regulations that will enable cable operators to prohibit the use of PEG access channels for material that is obscene, sexually explicit or that promotes unlawful conduct. Plainly, the cable operator is at most permitted, but not required, to censor PEG

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[2] Comments of Continental Cablevision, Inc. to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 6-8 (filed December 7, 1992) (hereafter "Comments of Continental").

access programming.[3] Not only is a cable operator not required to take any steps to prevent any type of programming on a PEG channel, but the operator will be immune from liability, pursuant to 47 U.S.C. 558, unless the program involves obscene material.[4]

A cable operator may refuse to exercise its power to prohibit certain types of programming material over PEG access channels, as a result of its own, unilateral decision. It follows that an operator may limit or condition any such authority it may have through a negotiated agreement with a franchising authority or any other entity. Continental's attempt to use potential liability as an excuse for voiding its contracts is unsupported by principles of contract law, which allow parties to allocate risks as part of their bargain.

The FCC has indicated that where a right under federal cable law is permissive, existing agreements that restrict use of that right remain in full force and effect. For example, the FCC concluded that franchise agreements requiring cable operators to

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[3] The City profoundly disagrees with the unsupported assertion by InterMedia Partners that because cable operators are likely to exercise their rights to censor certain PEG programming, Section 10(c) is somehow mandatory rather than permissive. See Comments of InterMedia Partners to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 2 (filed December 7, 1992) (hereafter "Comments of InterMedia Partners").

[4] Section 10(d) of the Act only eliminates cable operator immunity for obscene programming shown on PEG access channels. Both operators and supporters of access have argued that this provision should be read to impose liability only where an operator knows that a program is obscene; under this approach, in situations where an operator does not manage access, it could have no liability for the programming.

pay less than the maximum amount of franchise fees permitted by new federal regulations were not affected by regulations allowing franchising authorities to charge more.[5] Likewise, a franchise agreement requiring a cable operator to pay only 3 percent of its gross revenues to the franchising authority is not preempted or otherwise affected by 47 U.S.C. 542(b), which allows a franchising authority to collect up to 5 percent of gross revenues.[6]

In the same way, an agreement by a cable operator not to exercise control over PEG access programming or facilities constitutes a valid contract, whereby an operator waives or conditions exercise of a permissive right. The operator has merely delegated to another entity the responsibility for administrating PEG access. The Act does not preclude an operator from agreeing not to exercise any powers it may have, and thus it does not invalidate an existing promise by a cable operator that it will not in any way interfere with PEG access use.

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[5] "Report and Order: Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships," 66 F.C.C.2d 380, 403 n.24 (1977).

[6] Similarly, other permissive rights may be waived by agreement by the operator or franchising authority. For instance, franchising authorities have not been deemed to be statutorily required to exercise their rights under 47 U.S.C. 531(a) to require cable operators to provide PEG channel capacity.

B. Preemption Analysis Does Not Require a Finding that Agreements Regarding A Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are Preempted.

State and local activity is preempted by federal law only where (1) Congress has expressed a clear intent to preempt such activity; (2) Congress has completely occupied the field of regulation and has left no room for state or local activity; or (3) compliance with both federal and state or local law is impossible. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984). Where federal law can exist compatibly and consistently with state or local regulation, however, it is not preempted, and both remain in effect. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (federal regulation should not be deemed preemptive of state regulatory power in the absence of persuasive reasons). "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end." Id. at 145.

Congress did not in any way preempt the field regarding control over PEG access programming. It did not expressly prohibit franchising authorities and cable operators from reaching agreements with respect to control over PEG programming and facilities. Rather, federal law expressly allows such agreements. See, e.g. 47 U.S.C. § 544 (d)(1). Nor does Section 10(d) specifically require the FCC to allow operators to demand indemnities broader than those they may be able to obtain through valid contract negotiation.

Congress did not "occupy the field" of regulation in this

area. Rather, a cable operator's right to exercise control over PEG programming is permissive rather than required (and even so is limited to three specifically enumerated types of programming). Further, a cable operator may be liable for PEG programming only in cases where obscene material is aired, and even that potential liability may be strictly curtailed under FCC rules.[7]

Moreover, there is nothing inconsistent between the Act and state or local agreements that limit a cable operator's control over PEG use. To the contrary, 47 U.S.C. 531(e) specifically prohibits a cable operator from exercising editorial control over PEG channels and 47 U.S.C. § 531(b) allows the franchising authority to specify "rules and procedures for the use" of PEG channels. In amending the federal cable law, Congress chose to retain these provisions. Thus, agreements by cable operators not to exercise control over PEG access programming or facilities are consistent with, and in fact, reaffirm, federal law.

The fact that local or state activity addresses the same objectives as federal law does not necessarily require preemption. Florida Lime and Avocado Growers, 373 U.S. at 142. The Supreme Court has recognized, for instance, that a state may adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. Pruneyard

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[7] See e.g., Comments of InterMedia Partners at 15-16 (urging FCC to adopt regulations imposing liability on cable operators only when they had actual knowledge that the programming contained obscene material).

Shopping Center v. Robins, 447 U.S. 74, 81 (1980).[8] Franchise agreements that limit control by and/or liability of cable operators over PEG access facilities are not in any way inconsistent with Section 10 of the Act. Rather, such agreements complement federal cable law. Nothing in the Act requires preemption of franchise or other agreements regarding PEG access facilities.

C. Public Policy Considerations Require a Determination that Agreements Regarding a Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are not Preempted by the Act.

Continental's parent company has asked the Commission to sweep away all franchise provisions in which a cable operator has agreed to relinquish control over access programming and any provisions that indemnify cable operators for liability with respect to PEG access facilities, to the extent that such indemnity agreements limit a cable operator's control over obscene or indecent programming. Continental's parent company admits that such provisions are included in many franchise agreements.[9]

In essence, the Commission is being asked to substantially alter a significant number of carefully negotiated agreements,

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[8] In Pruneyard, the Supreme Court upheld free speech rights guaranteed by the State Constitution without deciding whether those rights were protected under the First Amendment. Similarly, franchise agreements that preclude a cable operator from exercising control over PEG access programming provide greater freedom of speech than is required by federal law.

[9] Comments of Continental at 6-7.

and to eliminate part of the consideration provided by cable operators in exchange for obtaining (or retaining) cable franchises. This represents no small sacrifice for franchising authorities, PEG access users, and cable subscribers. The Commission should consider carefully the public policy implications of acceding to the request made by Continental's parent and others.

The agreements that the cable operators ask the FCC to preempt are bargained-for concessions and constitute consideration by the operator. The City of St. Paul, for example, waived its claims to past, unpaid franchise fees, as well as certain other claims, specified in the Settlement Agreement, that the City might have raised against the cable operator, Continental. In exchange, Continental agreed, among other things, that it would not exercise any control over rules and procedures governing PEG facilities and equipment. This promise was a substantial element of the consideration provided by Continental, and constituted an integral and material part of the Settlement Agreement between the City and Continental. Continental's parent appears to be asking the FCC to eliminate part of its end of the bargain in St. Paul and elsewhere.

There is no need for the FCC to unilaterally change those bilaterally-negotiated agreements, and indeed, it cannot do so fairly, preserving the relative balance between the parties. There is no justification for preempting contracts where, as here, there is no conflicting federal law, and where to do so

would deprive communities and cable subscribers nationwide of the benefits of promises made by their local cable operators, without providing any corresponding compensation.

III. CONCLUSION

For the foregoing reasons, the City of St. Paul, Minnesota respectfully requests that the Commission reject cable operator's request that it rule that state and local agreements regarding control over, and liability for, PEG access programming and facilities are preempted.